



Office of the Attorney General

State of Texas

February 3, 1993

DAN MORALES

ATTORNEY GENERAL

Mr. Todd K. Brown
Acting Executive Director
Texas Workers' Compensation Commission
4000 South IH 35
Austin, Texas 78704

OR93-050

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12445.

The Texas Workers' Compensation Commission (the "commission") has received a request for information relating to a research study developed by the Medical Review Division regarding charges for operating room services for hospitals in the Houston area.¹ Specifically, the requestor seeks:

copies of studies and reports undertaken by the Texas Workers' Compensation Commission with respect to rates and charges of hospitals in Houston, or more importantly, hospitals in the Medical Center with respect to the operating room fee or "global" fee.

You have submitted to us for review representative samples of the requested information and claim that they are excepted from required public disclosure by sections 3(a)(10) and 3(a)(11) of the Open Records Act.

Pursuant to section 7(c) of the act, we have notified the 26 entities whose proprietary interests might be implicated by release of the requested information and have solicited arguments in support of your assertion that the requested information is excepted

¹The requestor advises us that his request is to be interpreted to include information regarding hospitals other than those in the Houston area.

from required public disclosure by section 3(a)(10) of the Open Records Act.² In response, we have received letters from eight of the entities: the Harris County Hospital District, Harris Methodist Fort Worth, HCA Women's Hospital of Texas, Humana Inc., Hunt Memorial Hospital District, Intracorp, Parkland Memorial Hospital, and Valley Baptist Medical Center of Harlingen, Texas. Briefly, the eight responding companies seek to withhold some or all of the information submitted to the commission:

1. The Harris County Hospital District, whose response to the request was not solicited, does not object to release of any of the requested information to the extent that it contains only monetary charge information it submitted to the commission.
2. Harris Methodist Fort Worth contends that all information relating to Harris Methodist Fort Worth does not fall within the scope of the request. In the alternative, it claims that this information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act as information constituting "trade secrets" and commercial or financial information. In addition, Harris Methodist Fort Worth claims that the requested information is excepted from required public disclosure by section 3(a)(4) of the Open Records Act.
3. HCA Women's Hospital of Texas claims that all information relating to HCA Women's Hospital of Texas is protected from required public disclosure by section 3(a)(4) of the Open Records Act. In addition, it claims that this information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act as information constituting "trade secrets."
4. Humana Inc. objects to release of any of the requested information and specifically to copies of records furnished by the Humana Hospitals to the commission. Humana Inc. claims that these records are excepted from required public disclosure by section 3(a)(10) of the Open Records Act as information constituting "trade secrets." In addition, Humana Inc. claims that the requested information is excepted from required public disclosure by section

²Pursuant to section 7(c) we notified the following 26 entities: Ben Taub General Hospital; Cost Containment Associates; Golden Plains Community; Harris Methodist; HCA Woman's Hospital of Texas; Hendrick Medical Center; Hermann Hospital; Highland Hospital; Hood General Hospital; Hospital Auditing Solutions; Humana Hospital Medical City Dallas; Hunt Memorial Hospital; Intracorp; Lutheran General Hospital; Midland Memorial Hospital; Parkland Memorial Hospital (Dallas); PRNA, Inc.; Sam Houston Memorial Hospital; St. Joseph Hospital; St. Luke's Episcopal Hospital; Santa Rosa Healthcare Corporation; UT Medical Br. Hosp. at Galveston; Uvalde Memorial Hospital; Valley Baptist Medical Center; Walls Regional Hospital; and Yale Hospital.

3(a)(1) of the Open Records Act in conjunction with the doctrine of common-law privacy.³

5. The Hunt Memorial Hospital District does not object to release of any of the requested information.

6. Intracorp objects to release of all of the documents it submitted to the commission, claiming that these documents constitute "trade secrets" and are thus excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

7. Parkland Memorial Hospital⁴ claims that information relating to Parkland Memorial Hospital is excepted from required public disclosure by sections 3(a)(4) and 3(a)(10) of the Open Records Act.

8. Valley Baptist Medical Center of Harlingen, Texas, claims that information it submitted to the commission does not fall within the scope of the request. In the alternative, it claims that this information is excepted from required public disclosure by sections 3(a)(1) and 3(a)(10) of the Open Records Act as information constituting "trade secrets" and commercial or financial information. In addition, Valley Baptist Medical Center claims that the requested information is excepted from required public disclosure by section 3(a)(4) of the Open Records Act.

The remaining 19 entities -- Ben Taub General Hospital; Cost Containment Associates; Golden Plains Community; Hendrick Medical Center; Hermann Hospital; Highland Hospital; Hood General Hospital; Hospital Auditing Solutions; Lutheran General Hospital; Midland Memorial Hospital; PRNA, Inc.; Sam Houston Memorial Hospital; St. Joseph Hospital; St. Luke's Episcopal Hospital; Santa Rosa Healthcare Corporation; UT Medical Br. Hosp. at Galveston; Uvalde Memorial Hospital; Walls Regional Hospital; and Yale Hospital--have not responded to our invitation to submit arguments explaining why their proposals are excepted from disclosure under the Open Records Act. Accordingly, the information concerning these entities may not be withheld from required public disclosure and must be released. *See, e.g.,* Open Records Decision Nos. 405, 402 (1983).

We turn first to section 3(a)(4). Section 3(a)(4) excepts from required public disclosure "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in the

³Humana asserts that some of the requested information is protected by "false-light" privacy interests. In Open Records Decision No. 579 (1990), this office determined that "false-light" privacy is not a proper consideration under section 3(a)(1) of the Open Records Act.

⁴Parkland Memorial Hospital is operated by Dallas County Hospital District, a political subdivision. Because of our resolution of this matter, we need not consider whether a political subdivision may hold information excepted by section 3(a)(4) and 3(a)(10) to the same extent that a private entity may. *See* Educ. Code § 51.911; Open Records Decision No. 497 (1988).

competitive bidding process. Ordinarily, it does not apply once, as here, contracts have been awarded. Open Records Decision No. 541 (1990). Neither the commission nor the respondents indicate why the requested information may be withheld under section 3(a)(4) at this time. Accordingly, the requested information may not be withheld under section 3(a)(4).

We turn next to section 3(a)(10). Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted under section 3(a)(10) only if it is privileged or confidential under the common law or statutory law. Open Records Decision No. 592 (1991) at 9.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.⁵

⁵The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty

In Open Records Decision No. 592 (1991), this office determined that lists of all the goods and services provided by a hospital and the price the hospital charges for each of those goods and services are not "trade secrets" excepted from public disclosure by section 3(a)(10) of the Open Records Act. We have examined the documents submitted to us for review and the respondents' arguments in support of their assertion that the requested information constitutes "trade secrets." Because the documents at issue here are similar to those at issue in Open Records Decision No. 592, we conclude that our determination in that decision is controlling here. Moreover, none of the respondents have provided us with additional information distinguishing the information at issue here from that at issue in Open Records Decision No. 592, nor have any of the respondents made a *prima facie* case establishing that any of the requested information constitutes "trade secrets." We conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 3(a)(10) of the Open Records Act.⁶

Additionally, neither the commission nor any of the respondents have established that any of the requested information merits protection as commercial or financial information under the second prong of section 3(a)(10). In Open Records Decision No. 592 (1991) (copy enclosed), this office held that "to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." Open Records Decision No. 592 at 9 (citing the summary). While some of the respondents claim that some of the requested information is made confidential by law, none of the respondents have identified any such law. Furthermore, we are unaware of any law that makes confidential any of the information submitted to us for review. Having examined the documents submitted to us for review and having considered the respondents' arguments, we have no basis to conclude that the requested

(footnote continued)

with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319, 306 (1982); 255 (1980). When an agency or company fails to provide relevant information regarding factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). See Open Records Decision No. 402 (1983).

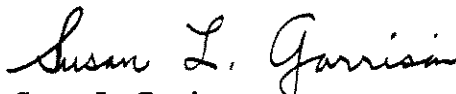
⁶Some of the respondents claim that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 3(a)(10). On the basis of the reasoning in Open Records Decision No. 494 (1988), some of the respondents assert that the requested information is excepted because its release would either 1) impair the board's ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. Past open records decisions issued by this office have relied on federal cases ruling on exemption 4 of the federal Freedom of Information Act (FOIA) in applying section 3(a)(10) to commercial information. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). However, in Open Records Decision No. 592, reliance on federal interpretations of exemption 4 of FOIA was reexamined. As a consequence of this reexamination, open records decisions exempting commercial and financial information pursuant to federal interpretations of exemption 4 were overruled.

information is excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

You also claim that a memorandum dated March 21, 1991, from Carolyn Hamilton to Nancy Kozak is excepted from required public disclosure by section 3(a)(11) of the Open Records Act. You have failed, however, to indicate the information in this document to which the section 3(a)(11) exception applies. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental entity does not claim an exception or fails to show how it applies to the records, the entity waives the exception unless the information is deemed confidential by the act. See Attorney General Opinion JM-672 (1987). Because you have not demonstrated how the section 3(a)(11) exception applies to this memorandum, we have no basis to conclude that it is excepted from required public disclosure by section 3(a)(11) of the Open Records Act.⁷ Accordingly, the requested information must be disclosed in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-050.

Yours very truly,



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Opinion Committee

SLG/GCK/mc

Ref.: ID#s 12445, 13921, 13917, 13918
ID#s 13930, 13971, 13993, 13994
ID#s 14003, 14018, 14032, 14042
ID#s 14058, 14059

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⁷See *Texas Department of Public Safety v. Gilbreath*, No. 3-092-024-CV (Tex. App.--Austin, 1992 n.w.h.). This decision does not alter our conclusion regarding this information.

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